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the grantor acquires and registers his title, to whom does it inure where both grantees purchase for value in good faith? If the subsequently acquired title passes as if conveyed by the original deed, it would vest in the holder of the elder deed, and having vested, would not be affected by subsequent happenings.<sup>63</sup> An obvious result would be that the registry laws would afford small protection to the purchaser, who would have to search the records against each name in his chain of title not only since the period when such grantee acquired title, but indefinitely back of that period, in order to be sure that the grantor had not before acquiring title given a deed which by estoppel transferred the subsequently acquired title to an earlier grantee and thus deprive the purchaser without notice of the title he relied on.

Our courts, in common with many others, hold that such an application of the doctrine of estoppel is inconsistent with the registry laws, which were intended to protect one who had secured a transfer of the title as registered. Consequently, a purchaser is charged with notice only of transfers from the holder of the registered title, and need not search the records against his several grantors' names prior to the dates at which they acquired title.<sup>64</sup> Therefore, the holder of a recorded title has priority over the claimant by estoppel under a deed made before the grantor acquired title.<sup>65</sup>

Deeds by the holders of future contingent interests, such as contingent remainders and executory devises, as against the grantor and his heirs, convey such contingent interests by estoppel, whether with or without warranty, where the contingency is only as to the event and the person is determined.<sup>66</sup>

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## LIMITATIONS ON THE ATTRACTIVE NUISANCE DOCTRINE

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**I**N THE FIELD of tort elasticity and adaptability to changing conditions are paramount. Nowhere else do we find fictions less excusable, formalism more harmful, or mere mechanical logic more blinding. We must recognize the pressing need of conscious progression toward "the adjustment of principles and doctrines

<sup>63</sup> *Jarvis v. Aikens* (1853) 25 Vt. 635, where the Court in answer to an argument based on the registry laws said: "Our registry system can have no control of the question. There was no title in A. [the grantor] when he deeded to M. [the second grantee]; it had before passed [by estoppel] to J. [the first grantee]." See cases cited 2 Tiffany, *Real Property*, 2nd ed., 2131, note 55.

<sup>64</sup> *Door Co. v. Joyner* (1921) 182 N. C. 518, 109 S. E. 259, 1 N. C. L. Rev. 56; *Truitt v. Grandy* (1894) 115 N. C. 54, 20 S. E. 293; *Maddox v. Arp* (1894) 114 N. C. 585, 19 S. E. 665.

<sup>65</sup> *Door Co. v. Joyner*, *supra*. Somewhat similar under our statutes is the position of a judgment creditor under a docketed judgment and the holder of a prior unrecorded mortgage. *Realty Co. v. Carter* (1915) 170 N. C. 5, 86 S. E. 714.

<sup>66</sup> See cases cited in notes 4 and 59 *supra*. See also *Garvin v. Carroll* (1916) 276 Ill. 476, 114 N. E. 927.

to the human conditions they are to govern rather than to assumed first principles; for putting the human factor in the central place and relegating logic to its true position as an instrument."<sup>1</sup> Within the past year a decision announced by the Supreme Court of the United States<sup>2</sup> has brought prominently into discussion a question especially illustrative of this need. Much has already been said on this subject but it is believed that the problem presented is worthy of continued consideration.

In the *Britt* case<sup>3</sup> two children, members of a motor touring party, met a shocking death from poisonous water, swallowed while swimming in the defendant's abandoned basement. It appears that this basement was one hundred feet from the highway and could not be seen without entering the lot. Several paths led across this lot, but none led to the pool. The lot was improperly fenced. The water appeared clear, pure, and harmless, and no ordinary inspection, even by an adult, would have revealed its highly dangerous nature. The doctrine of attractive nuisance was urged as the basis of liability. The majority opinion,<sup>4</sup> written by Mr. Justice Holmes, held that this doctrine did not apply and set aside the judgment for the plaintiff rendered by the lower court and reversed the finding of the Court of Appeals affirming the judgment of the trial court.

The basis for this holding was, in outline: (a) infants have no greater right to go upon the land of another than have adults; (b) the fact of the trespassers' infancy places upon the landowner no greater duty to expect them, or to care for their safety; (c) "temptation is not invitation;" (d) there was no showing that children were in the habit of resorting to this place; (e) the pool could not be seen from the highway, and was, therefore, not an invitation in fact; (f) a path can not be an invitation to go to any place to which it does not lead; (g) the doctrine of allurements, if adopted, is so sweeping that it must be cautiously applied in order that it shall not become unjust and create impracticable requirements.

This opinion has been made the subject of somewhat severe criticism,<sup>5</sup> but it is submitted that the charge of "mechanically delimited categories" falls more properly upon the dissenting argument. The opinion of Mr. Justice Holmes bears such a resemblance to the North Carolina case of *Briscoe v. Henderson Lighting & Power Co.*,<sup>6</sup> that it seems worth while to consider the result of the *Britt* case

<sup>1</sup> Roscoe Pound, in *Mechanical Jurisprudence*, 8 Col. Law Rev. 605, 609. For a most striking example of this process in operation see the opinion of Judge Cardozo in *Hynes v. New York Central* (1921) 231 N. Y. 229, 131 N. E. 898, annotated in 35 Harv. L. Rev. 68, and 7 Cornell L. Quar. 75.

<sup>2</sup> *United Zinc and Chemical Co. v. Britt* (U. S. 1922) 42 Sup. Ct. 299, annotated in 8 Cornell L. Quar. 85, 36 Har. L. Rev. 113, 5 Ill. L. Rev. 62, and 32 Yale L. J. 200. Doctrine approved: *New York, N. H. & H. R. Co. v. Fruchter* (U. S. 1922) 43 Sup. Ct. 38.

<sup>3</sup> *Supra*, note 2.

<sup>4</sup> The vigorous dissenting opinion of Mr. Justice Clarke was concurred in by Mr. Chief Justice Taft and Mr. Justice Day.

<sup>5</sup> "Under the *Britt* case, mechanically delimited categories of trespassers, invitees and licensees are erected from the fictions of implied license and implied invitation; those in the category of trespassers are held to be owed no duty of care; the foreseeability of the child's presence through other causes than a fictional license or invitation is immaterial. The substitution of rigidity for flexibility in the branch of the law where flexibility to meet the varied circumstances of human experience is a prime requisite, seems a retrogression in the humanization of the law of torts." 36 Harv. L. Rev. 113.

<sup>6</sup> (1908) 148 N. C. 396, 62 S. E. 600, 19 L. R. A. (n. s.) 1116. The facts in this case are in certain respects parallel to the *Britt* case, in that the boy was not allured upon the premises by the agency which caused his injury, and there was in fact no notice of his actual or probable presence. The *Briscoe* case has been approved in *Power v. Casualty Co.* (1910) 153 N. C. 275, 69 S. E. 234; *Ferrell v. Cotton Mills* (1911) 157 N. C. 528, 73 S. E. 142; *Barnett v. Mills* (1914) 167 N. C. 576, 83 S. E. 826; *Starling v. Cotton Mills* (1915) 168 N. C. 229, 84 S. E. 388; *Krachanake v. Mfg. Co.* (1918) 175 N. C. 435, 95 S. E. 851; *Hardy v. Mo. Pac. Ry. Co.*, 266 Fed. 860. See also 47 L. R. A. (n. s.) 1102.

under the rule of the North Carolina case. As a preliminary to such a consideration it may be pardonable to review in a rather summary fashion<sup>7</sup> the commonly suggested principles governing the liability of the occupant of land toward trespassers, with particular reference to those of "tender age" (assuming that there is some way of determining what age is a "tender age").

At the very outset we must take warning against two intruding elements. It must be recognized that there is nothing sacred in the right to use and occupy land. In cases dealing with immature children sentimentality must not be allowed to take the place properly allotted to sentiment. The right to use land has no reason to claim immunity higher than that granted to other rights, which yield to the changing needs of a developing social organism. It too must yield. It cannot be given fixed and eternal attributes. Nor does it seem proper to picture every child of a dozen years or less as a winged cherub, incapable of intentional wrong.<sup>8</sup> The contention that any doctrine which does not follow the theory of alluring nuisance is inhumane is nothing less than an appeal to the emotions alone,<sup>9</sup> clouding the problem involved and perhaps even tilting the scales of justice.<sup>10</sup> The attempt to state the liability of the landowner in a formula of mathematical exactness makes a fetch of mere legal terminology, with the result that many discussions in this field sound like the argument between Tweedledum and Tweedledee.<sup>11</sup>

<sup>7</sup>The scope of this article does not permit a full collection of citations. Excellent collections of abundant authorities are readily available. See: Jeremiah Smith, *Liability of Landowners to Children Entering Without Permission*, 11 Harv. L. Rev. 349 and 434, and the supplementing note in 12 *id.* 206; John C. Townes, *Liability Arising from Dangerous Premises*, 1 Tex. Law Rev. 1; 25 Yale L. J. 84; Burdick, *Law of Torts*, 3d ed., secs. 557 ff.; Thompson, *Negligence*, Vol. 1, secs. 1027-1054; Cooley, *Torts*, 3d ed., pp. 1269 *et seq.* The discussion by the late Professor Burdick is especially satisfactory. A full note collecting the cases to its date is found in 19 L. R. A. (n. s.) pp. 1095-1173, inclusive, beginning with *Cahill v. Stone & Co.* (1908) 153 Cal. 571, 96 Pac. 84, 19 L. R. A. (n. s.) 1095. See also 47 L. R. A. (n. s.) 1102, n.

<sup>8</sup>Looking back at what seems to have been a fairly normal boyhood, containing perhaps an average of youthful transgressions, the writer finds little sympathy with the view that even a child of tender years is necessarily an unconscious and instinctive transgressor and therefore an allured and "innocently baited victim." Some of those who have discussed this topic either must be a trifle forgetful or else must have passed through a most sweet, innocent and sheltered childhood.

<sup>9</sup>"This cruel and wicked doctrine, unworthy of a civilized jurisprudence, puts property above humanity, leaves entirely out of view the tender years and infirmity of understanding of the child, indeed his inability to be a trespasser in sound legal theory, and visits upon him the consequences of his trespass just as though he were an adult . . ." Thompson, *Negligence*, Vol. 1, sec. 1026.

" . . . the mind impelled by the instinct of the heart, sees at once in such a place, and under these circumstances he had good reason to expect that one day or other some one, probably a thoughtless boy in the buoyancy of play, would be led there, and injury would follow . . . Perhaps the best monitor in such a case is the conscience of one who feels, in his dreadful recollection, the crushing sense that he had left such an engine of ill to take the life of an innocent child. . . The common feeling of mankind, guided by the sacred heart of the great law of love, and the common sense of jurors, must be left in such a case to pronounce upon the facts." *Hydraulic Works Co. v. Orr* (1877) 83 Pa. St. 332, 336.

<sup>10</sup>"These phrases have made such a profound impression on some judges as to obscure the vital point of inquiry and thus prevent a careful consideration of the question at issue." Jeremiah Smith, 11 Harv. L. Rev. 349, 352.

"As a practical result, the landowner is saddled with the responsibility of an insurer of infants, who are curious and agile enough to trespass upon lands, having improvements which may be dangerous for them." Burdick, *Law of Torts*, sec. 566.

In this same connection the writer calls attention to the case of *Edginton v. Burlington & Ga. R. Co.* (1902) 116 Iowa 410, 90 N. W. 95, 57 L. R. A. 561, in which it was said that the rule of attractive nuisance would not be extended to the "hoodlum, disregarding property rights from mere love of mischief, and taking risks out of mere bravado, or in conscious defiance of moral and legal restraint." Considering such a child, the court says it "may pity his folly, but justly say, as the law says, that having intelligently assumed the risk, he ought not to recover damages."

Professor Burdick points out that it will be for the jury to determine whether the boy is a "hoodlum" or an "innocently baited victim," and will determine whether the premises were dangerous, and whether they were alluring, and whether the defendant used proper care in guarding them. In section 568 he points out that the juries are more than likely to find in favor of the injured child since the cases which have been carried to the appellate courts are with practical uniformity those in which it is the landowner and not the child who is seeking to avoid the decision of the jury.

<sup>11</sup>Lewis Carroll, *Through the Looking Glass*, Ch. IV: "I know what you're thinking about," said Tweedledum, "but it isn't so, nohow." "Contrariwise," continued Tweedledee, "if it was so it might be; and if it were so it would be; but as it isn't, it ain't. That's logic."

Some of the difficulty may be traced to the conservatism of the courts and perhaps to an unwarranted and overdrawn fear of judicial legislation.<sup>12</sup> Whatever may be true in other fields, in the field of tort there is an ever-present need that the courts shall always be alert to keep declared duties attuned to the needs of society by abrogating or modifying old ones, and *with reasonable caution*, declaring new ones. Inflexibility in the law of torts is a sign of impending dissolution and death. No legislative body has yet existed which could adjust a rule of torts with sufficient nicety to assure smoothness of function in the kaleidoscopic relations of society, and none has possessed sufficient skill and promptness to make the minor adjustments which are continually necessary. Judicial caution is here a high virtue; judicial diffidence is not.<sup>13</sup> The common law is not a closed book to which new chapters may not be added by the original authors, the courts, and to which appendixes may be attached only by legislative bodies. A better simile is that of the modern loose-leaf encyclopædia, in which new pages may be added or substituted to meet the development of advancing science.

No recent case has more strongly raised the question of the insufficiency of heretofore accepted principles as a solution for new problems than has the *Britt* case. That this question in this form has continually recurred, that the fixed and recognized rules governing the duties of the occupant of premises to the stranger thereon are still under fire, that the "attractive nuisance" doctrine, which traces back to the *Stout* case<sup>14</sup> as interpreted, *inter alia*, by the *McDonald* case<sup>15</sup> has not in approximately fifty years provided an even partially satisfactory solution, that legislative bodies have not passed remedial statutes; all these furnish ground for an insistent demand that the duties and liabilities of the occupier of land be given further consideration.

Briefly stated,<sup>16</sup> the chief rules which have received recognition are as follows:

1. The occupier of land must so use it that unreasonable ill effects of his use shall not reach persons or property beyond its boundaries.
2. Persons making a reasonably careful use of an adjoining highway must not be endangered by changes in his premises, whether injury be occasioned during the use of the highway or during an accidental deviation therefrom.
3. He must maintain it in a reasonably safe condition for the entry thereon of invitees.
4. "The owner of private grounds is under no obligation to keep them in safe condition for the benefit of trespassers, idlers, bare licensees, or others who come upon them, not by

<sup>12</sup> A typical statement of this kind is found in *Dobbins v. M. K. & T. R. Co.* (1897) 91 Tex. 60, 41 S. W. 62, 66 A. S. R. 856, where after saying that the declaration of a duty to children is a proper legislative use of the police power, the court adds: "Whenever such a (new) duty is imposed the courts may properly enforce it or allow damages for its breach, but not before." See also, 148 N. C. 413, where the court quotes from the opinion of Judge Buchanan in *Walker v. Railroad* (1906) 105 Va. 226, 53 S. E. 113, 4 L. R. A. (n. s.) 80, as follows: "While the courts should and do extend the applications of the common law to the new conditions of advancing civilization, they may not create new principles or abrogate any known one. If new conditions can not be met by the application of existing laws, the supplying of needed laws is the province of the legislature and not the judicial department of the government."

<sup>13</sup> Among others, the opinions of Mr. Justice Cardozo of the New York Court of Appeals in a delightful way reveal these stimulating and illuminating characteristics. As a typical instance see *Hynes v. New York Cent. R. Co.*, cited *supra*, note 1.

<sup>14</sup> *Stout City & Pac. R. Co. v. Stout* (U. S. 1875) 17 Wall. 657, 21 L. Ed. 745.

<sup>15</sup> *Union Pacific R. Co. v. McDonald* (1894) 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434. See also, *Keffe v. Milwaukee R. Co.* (1875) 21 Minn. 207, 18 Am. Rep. 393.

<sup>16</sup> The authorities cited *supra* 7, furnish illustrations of these rules, most of which are also set forth in the opinion of Mr. Justice Connor in the *Briscoe* case, *supra*, note 6. Citations will not here be offered upon all specific points. See, however, *Ryan v. Towar* (1901) 128 Mich. 463, 87 N. W. 622.

any invitation express or implied, but for their own convenience or pleasure, or to gratify their curiosity, however innocent or laudable their purpose may be."<sup>17</sup>

5. The only duty owing to a trespasser is to refrain from wantonly injuring him after he is discovered; there is none requiring the landowner to be vigilant in discovering him.

6. A trap may not be set for a trespasser. He is a wrongdoer but not an outlaw beyond the pale of the law.

7. There is a strong tendency to hold that reasonable anticipation is equivalent to actual knowledge of the trespasser's presence.

8. Where the landowner has reason to *suspect* the presence of trespassers, he may not release (or continue) a dangerous force without previous reasonable search or warning.<sup>18</sup>

9. Where the expected trespasser is an infant, the landowner should be required to use a correspondingly higher degree of care.<sup>19</sup>

10. The attractive nuisance doctrine offers a well developed exception to the general rule of non-liability to trespassers, in the statement that, "one who artificially brings or creates on his own premises any dangerous thing, which from its nature has a tendency to attract the childish instincts of children to play with it, is bound as a mere matter of social duty, to take such reasonable precautions as the circumstances permit of, to the end that they be protected from injury while so playing with it or coming in its vicinity."<sup>20</sup>

Perhaps too much energy has already been expended in attacking and defending the last named doctrine, but a few suggestions regarding it are here deemed necessary. At the very outset it must be observed that the doctrine of alluring nuisance is founded upon fictions and not upon facts, upon assumptions and not upon demonstrated relationships.<sup>21</sup> This alone should cause its rejection if it is possible to frame a rule in accord with the actual facts. While fictions did, during the period of strict procedural formalism, aid in the development of our law, it is to be observed that we have paid and are paying a very high price for the temporary relief which they afforded. Few influences have contributed more to the permanent distortion of legal theories and principles.

Secondly, the principle as announced is so broad and so sweeping that it can not be carried to its logical extreme in application without reaching the point of

<sup>17</sup> Quoted from *Union Stock Yards & Transit Co. v. Rourke* (1881) 10 Ill. App. 471. Quoted also in the *Briscoe* case, 148 N. C., at p. 403. Compare, *Kelly v. Benas* (1909) 217 Mo. 1, 9, 116 S. W. 557.

<sup>18</sup> "To adults entering without permission the landowner owes some legal duties. He is under a duty not to intentionally inflict harm upon a trespasser, save when he is exercising within legal limits the rights of defense and expulsion. He is also, by the better view, under a duty to avoid harming the trespasser by bringing a force to bear upon him. It is a mooted question whether this duty is confined to cases where the presence of the trespasser is known to the landowner. Some authorities hold that the owner may, in special circumstances, be under a duty to use care to ascertain whether trespassers are present before setting in motion a force, which would be likely to endanger such persons if within reach. But the alleged duty if admitted, is material only when it is sought to make the landowner liable for actively bringing force to bear upon the trespasser." Jeremiah Smith, 11 Harv. L. Rev. 349.

And at page 365 in the same article see the suggestion: "There are some decisions which go to the extent of holding that the landowner, under special circumstances, owes a duty to ascertain whether trespassers are present. But the existence of this alleged duty and the failure to perform it are material only when it is sought to hold the landowner liable for setting (or keeping) force in motion when the trespasser is actually present on his land. . . . If I have reason to believe that adult tramps sleep in my meadow, and I start my mowing machine without looking ahead to see if any one is in the path of the proposed swath, some courts might hold me liable for running over a tramp if I could have avoided him by a better lookout. . . . 'There is a broad difference,' said Mr. Justice Carpenter (in *Mitchell v. Boston & Maine R. R.* (1894) 68 N. H. 96, 34 Atl. 674, 677) 'between the case of a trespasser's meeting an injury by reason of the dangerous condition of the defendant's premises, and that of an injury caused by the defendant's active intervention.'" Professor Smith calls attention to the fact that this sort of injury rarely occurs to the child trespasser, who is most often injured by a force set in motion by himself or his companions.

<sup>19</sup> There is no apparent reason why this rule should not be generalized to include those suffering from any infirmities such as illness, age, lameness, and, in times past, intoxication.

<sup>20</sup> Thompson, *Negligence*, Vol. I, sec. 1024; Bevan, *Negligence*, 2d ed., Vol. I, p. 189, n. 1. "An allurements seems to be some attraction added to the land, not the mere effect of the land in its natural state." See also the statement in 11 Harv. L. Rev. at p. 355, calling attention to the fact that the "play-thing" is generally something of practical necessity to the landowner in the beneficial use of his land, and perhaps necessary to the community as well.

<sup>21</sup> This statement is amply sustained by the authorities cited in note 7, *supra*.

absurdity,<sup>22</sup> and, as yet, nobody has been skillful enough to suggest how the rule may be stated as above set forth and at the same time indicate the point at which a limit may consistently be established. It has been suggested<sup>23</sup> that "the owner of property could not carry on his business in the necessary and ordinary manner and at the same time take precautions against trespassing children," but this only shifts the debate into another equally difficult field. Moreover, since it does no more than present in another form the question lying at the base of the entire discussion, namely: "whether the danger of occasional harm, under such circumstances, outweighs the benefit to the community of leaving owners unfettered in the beneficial use of their land in methods which cause no damage to persons outside their boundaries," it settles nothing.<sup>24</sup>

And, thirdly, as a corollary to the foregoing, no satisfactory settlement can ever be reached if we do not take into consideration *all* the parties involved; namely, the occupant of the land, whose use is to be restricted, the trespasser, whom we seek to protect, and the community, whose paramount interest must always outweigh the interests of individuals.<sup>25</sup> It may be charged, and not without truth, that the formal rules regarding the possession of property were framed largely from the point of view of the occupant of land, rather than for the protection of others. It seems to be equally true that the doctrine of alluring nuisance, because of the strong pull of sympathy, approaches the matter almost entirely from the position of the child trespasser and considers little besides his interests. Neither approach seems satisfactory. We must not lose sight of the fact that we are not seeking merely to protect immature infants, or to *punish* the landowner for some transgression. The sole question to be answered is whether the loss which has happened shall be allowed to lie where it has fallen, or whether it shall, so far as the award of pecuniary damages can produce that effect, be shifted to the culpable shoulders of another.

In his work on *Negligence*,<sup>26</sup> we find Mr. Thompson sadly lamenting the tendency to restrict the doctrine which grew out of the turntable cases. For the tendency is clear, and the attitude of those courts which have announced the rule is increasingly expressive of the desire to apply it, if at all, with great caution. The present writer finds no reason for regret<sup>27</sup> in the fact that in its most recent decisions,<sup>28</sup> the court in which the doctrine originated, has seen fit to limit sharply

<sup>22</sup> For examples see: *San Antonio & A. P. Ry. v. Morgan* (1898) 92 Tex. 98, 46 S. W. 28; *Ryan v. Towar*, *supra*, note 16; and *Walker v. Potomac Ry.* (1906) 105 Va. 226, 53 S. E. 113, 4 L. R. A. (n. s.) 80, and *Turess v. Railroad* (1898) 61 N. J. L. 314, 40 Atl. 614. It is obvious that it is wholly impossible to make premises boy-proof and yet leave them in usable condition. In the *Towar* case, children made a hole in a stone wall to get at the water-wheel upon which the injury occurred. In *Davis v. Malvern Light Co.* (1919) 186 Iowa 884, 173 N. W. 262, a barbed wire fence did not serve to keep a boy away from a charged electric wire. Compare: *Price v. Atchison Water Co.* (1897) 58 Kans. 551, 50 Pac. 450; *Consol. Elec. Co. v. Healy* (1902) 65 Kans. 798, 70 Pac. 884.

<sup>23</sup> *Chicago, etc. Ry. v. Fox* (1904) 38 Ind. App. 268, 70 N. E. 81.

<sup>24</sup> 11 Harv. L. Rev. at p. 369 and 12 Harv. L. Rev. 206.

<sup>25</sup> "A balance must be struck between the benefit to the community of the unfettered freedom of owners to make a beneficial use of their land, and the harm which may be done in particular instances by the use of that freedom. The true ground for the decision is public policy; i. e., expediency in the Benthamic sense of 'the greatest good to the greatest number;' the advantages to the community on the one side and the other are the only matters really entitled to be weighed."

<sup>26</sup> *Supra*, note 9. See also Cooley, *Torts* 3rd ed., p. 1272, and note.

<sup>27</sup> The writer takes considerable comfort in the fact that this was also the view of as careful and dispassionate a writer as the late Professor Burdick. See Burdick, *Law of Torts*, sec. 569, p. 532.

<sup>28</sup> *Supra*, note 2.

this doctrine of attractive nuisance, since he feels that any fair investigation of the reasoning behind this rule reveals it to be founded on fictions, dangerous if carried to its extreme applications,<sup>29</sup> and unjust if limited within bounds of safety.<sup>30</sup>

It is not, however, enough to point out reasons for rejecting the attractive nuisance doctrine. The matter is not thus settled. We have thereby merely returned to our point of original departure, after an unfruitful quest. If we do reject the doctrine, it must be with the admission that after all it was aimed at something needing attention and calling for a practical solution.<sup>31</sup> But we need not return to the time when the primitive announcement was made, that "he that is damaged ought to be recompensed."<sup>32</sup>

In the case of *Briscoe v. Henderson Lighting & Power Co.*,<sup>33</sup> the Supreme Court of North Carolina was asked to apply the attractive nuisance doctrine to the case of a boy who came upon the premises of the defendant to see what was going on in the rear portion of a theatre building which immediately adjoined the defendant's premises, and while there fell into a hot water well, which had been only slightly covered. After a thoughtful review of the subject the court declined to apply the broad and loose doctrine of alluring nuisance, and announced instead a highly commendable rule, which takes into consideration the infirmities of youth, the needs of the community, and the necessities of the occupant of the land. It does not forget humane emotions, neither does it permit unreasoning sympathy to run away with judgment or to distort settled legal principles. At page 411 of the official report, the court says:

"It must be conceded that the liability for injuries to children sustained by reason of dangerous conditions on one's premises is recognized and enforced in cases in which no such liability accrues to adults. This we think sound in principle and humane in policy. We have no disposition to deny it or to place unreasonable restrictions upon it. We think that the law is sustained upon the theory that the infant who enters upon premises having no legal right to do so, either by permission, invitation or license or relation to the premises or its owner, is as essentially a trespasser as an adult; but if, to gratify a childish curiosity, or in obedience to a childish propensity excited by the character of the structure or other conditions, he goes thereon and is injured by the failure of the owner to properly guard or cover the dangerous conditions which he has created, he is liable for such injuries, *provided the facts are such as to impose the duty of anticipation or prevision*,<sup>34</sup> that is, *whether under all of the circumstances he should have contemplated that children would be attracted or allured to go upon his premises and sustain injury.*"

And again at page 415:

"To impose upon the owners the burden of prevision, in the absence of any suggestion that by acquiescence or otherwise they had given a license to trespassers, would imperil the property of innocent persons."

<sup>29</sup> See *Turess v. Railroad*, quoted in 148 N. C., at p. 407.

<sup>30</sup> One need look no further than the *Briscoe* case, upon which this discussion turns, for justification of these conclusions.

<sup>31</sup> *Opelt v. Al. G. Barnes Co.* (Cal. App.) (1919) 183 Pac. 241. "The attractive nuisance doctrine, for all its fiction obscurities, is driving at a truth; and that the measure of assumption of risk which operates in law to defeat a recovery should not be the same for small boys and men—even on circus day."

<sup>32</sup> *Lambert v. Bessey*, 31 Car. II, T. Raym. 421, 423, 424.

<sup>33</sup> *Supra*, note 6.

<sup>34</sup> Italics are the writer's. In the unofficial reports this word has been erroneously printed as "provision," which greatly modifies the meaning intended to be expressed.

In other words, whenever the owner of premises has reason to know that the trespasser is upon his premises and liable to be injured by some thing *dangerous to that trespasser*, he is under legal duty to render and keep the premises correspondingly safe.

It is suggested that this was in fact the basis of the first turntable case, for in the *Stout* case<sup>35</sup> the court goes expressly upon the theory of liability for foreseeable hurt. It is said that the court in that case charged the jury in part as follows:

"But if the defendant did know, or had reason to believe, that the children of the place would resort to the turntable to play, and, if they did, they would or might be injured, then, if they took no means to keep the children away and no means to prevent accidents, they would be guilty of negligence and would be answerable for damages caused to children by such negligence. . . . That if they did not have reason to anticipate that children would be likely to resort to it, or that they would be likely to be injured if they did resort to it, then there was no negligence."

No emphasis at all seems to have been placed upon the matter of enticement, and it remained for succeeding cases<sup>36</sup> to translate this language into the doctrine of attractive nuisance, and to create a battle ground that within the last forty years has been occupied by contending forces.

It is interesting to note that the doctrine has had a hearing in the English courts. In the case of *Cooke v. Midland & G. W. Ry of Ireland*,<sup>37</sup> a child of four or five years was injured upon an abandoned turntable, situated near a highway, and reached by a well-worn path through a gap in the surrounding hedge. The turntable was not locked and had not been used by the defendant for some years. Railway employees, including the district inspector, had seen young folks of all ages disporting themselves upon it, but it did not appear that anybody had ever ordered them off. The machine was serving no useful purpose, and, to use the words of Lord MacNaghten, "it seems to have been abandoned to the sustenance of the railway inspector's goat, and the diversion of the youth of Navan." While some members of the court referred to the doctrine of attractiveness, it is obvious that this case, like the *Stout* case and the *Briscoe* case, goes upon the theory of foreseeable hurt to those known or reasonably expected to be upon the premises. Lord Loreburn says that the place "was, to the defendant's knowledge, an habitual resort for children," and Lord MacNaghten says: "Persons may not think it worth while to take ordinary care of their own property, and may not be compellable to do so; but it does not seem unreasonable to hold that, if they allow their property to be open to all comers, infants as well as children of maturer age, and place upon it a machine attractive to children and dangerous as a plaything, they may be responsible to those who resort to it with their tacit permission, and who are unable in consequence of their tender age to take care of themselves." Attractiveness argues only for the conclusion that there was knowledge of likeli-

<sup>35</sup> *Supra*, note 14.

<sup>36</sup> *Union Pacific v. McDonald*, and *Keffe v. Milwaukee Ry.*, cited *supra*, note 15.

<sup>37</sup> (1909) A. C. 229, cited in the *Britt* case. *Chenery v. Fitchburg R. R. Co.* (1893) 160 Mass. 211, 35 N. E. 554, 22 L. R. A. 575.

hood of presence and of probable injury, and seems to leave culpability hanging upon this question of knowledge. The North Carolina rule seems therefore to be a very satisfactory return to basic principles.

At first glance this rule might seem to render inoperative the ever-present element of allurements. But it is far from doing that, since the attractive nature of the premises or things thereon may be evidence that the occupier knew or should have known that trespassers were, because of those things, bound to appear on the land. Would any sane man who placed upon a vacant lot an organ grinder and his monkey have any doubts that, even in a small village, it would not be many minutes before there would be a number of children upon the lot? Tested by experience, a myriad of other things may be found which will attract children of all ages from nine to ninety, and when the owner or occupant of land has this notice of their probable presence it is not an excessive hardship to ask him to take reasonable steps to correct dangers or warn others of them.

Under the rule announced in the *Briscoe* case it seems probable that the North Carolina court would reach the same result as was reached by the Supreme Court of the United States in the *Britt* case.<sup>38</sup> For it appears that the owner there had no reason to know of the presence of trespassers who might bathe in this pool, unless we hold that the paths which crossed the lot and the fact of nearness to a city of 10,000 people carried this notice. The facts of the *Briscoe* case are sufficiently close to those of the *Britt* case to warrant the belief that in both cases alike the decision would be against the trespasser.

But upon the facts in the *Britt* case it is hard to be satisfied with this result, which was proper enough in the *Briscoe* case. There must be a feeling that the owner was not exactly blameless when he left a highly dangerous condition of this sort upon his land, and this is intensified by the fact that the condition was a perfectly useless one, wholly unconnected with any beneficial use of the premises. It is somewhat misleading to speak, as does Mr. Justice Clark in the *Britt* case, of "maintaining" this condition, since the word carries the idea of activity in continuance of the condition, whereas the danger was entirely a passive one. No one would for a moment deny that the danger was so great that a moral duty of the very highest kind rested upon the defendant company in respect of this pool of poisonous water. The real question is whether this moral duty shall find expression as a legal duty. The rather normal first reaction is to declare that where the injury is of such an outrageous nature something *must* be done to make the landowner responsible for injuries arising out of it. The turntable cases caused just such a reaction, and the doctrine of alluring nuisance stands as a warning against further hasty action in this connection.

Arising out of the considerations herein mentioned there is a suggestion which may be worth considering. We have seen that there is a tendency to hold the landowner liable for forces which he may release against *suspected* trespassers, without first making reasonable investigation to discover their presence, or first

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<sup>38</sup> *Supra*, note 2.

giving reasonable warning to those whose presence may be anticipated. This goes beyond the letter of the rule of the *Briscoe* case, but seems wholly within the general spirit of that decision, despite the fact that here we would be requiring a certain *previson*. What is at the basis of such a requirement? Is it not the notion that, while the trespasser must take premises as he finds them, and while, in general, he must look out for himself, we will not ask him to assume the risk of those things against which he can not possibly guard, and which without great inconvenience could be cared for by the landowner. This is the same underlying notion which, properly, led the court in the *Briscoe* case to hold that there would be liability in the case of infant trespassers where there would be none in the case of an adult. We therefore find developed along with the idea of culpability of the landowner arising out of his knowledge, the idea that his duty to render his premises safe must also be commensurate with the infirmities, or weakness, or inability to accomplish self-protection, of the trespasser. The trespasser is a wrongdoer, but he is not an outlaw to be wantonly destroyed. We are approaching desperately near wanton destruction, where there is left in the path of a possible trespasser an extremely deadly agency, wholly beyond his ability to recognize and thus avoid. In the much cited case of *Lynch v. Nurdin*<sup>39</sup> the court says, "Between wilful mischief and gross negligence, the boundary line is hard to trace; I should say impossible." While it requires an actual intention to make a trap out of a passively dangerous condition upon the defendant's land, may not the extremely treacherous and insidious nature of the danger, as in the *Britt* case, bring the matter desperately near the line, if not actually beyond it?

The reason for not permitting the landowner to release upon his land a force which he should know *may* injure *possible* trespassers is not based upon any desire to punish the landowner for wanton injury, and it is therefore not necessary to invoke any half-fiction of intent. We are simply saying that there are certain dangers which the trespasser does not assume, which he, by any exercise of his faculties, can not detect and avoid, and which he will not be required to anticipate.<sup>40</sup> Have we not here a basis for a reasonable extension of our rule? Is there, from the common-sense point of view, any but a technical difference between injury by a gun discharged without warning, and injury by any other means which no exercise of the faculties could detect, which no man in the light of his every-day experience could discover? Is this not the type of case in which a certain amount of *previson* should be required? In other words, if the danger is a highly poisonous pool of water, near a considerable city, should we shut our eyes to matters of common knowledge, and refuse to recognize that sooner or later trespassers are bound to appear on these premises, and that they will be likely to come into contact with this extreme danger, against which their highest vigilance will be no protection?

<sup>39</sup> (1841) 1 Q. B. 29.

<sup>40</sup> The case of *Union Stockyards and Transit Co. v. Rourke* (1881) 10 Ill. App. 474, cited at page 403 in the *Briscoe* case offers an excellent illustration of the limitation of this suggested rule, for there the trespasser could have discovered his peril by probing the ground with a stick, and was near a water-course where bogs and quagmires were to be anticipated. We might require a trespasser to carry a stick, but we could not demand that he equip himself with a complete chemical laboratory and be accompanied by an expert chemist.